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No. 87-1896

In The

Supreme Court of the United States

October Term, 1987

JEROME B. ROSENTHAL,
Appellant,

vs.

THE STATE BAR OF CALIFORNIA
Appellee.

On Appeal from
the Supreme Court of California

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Are the notice of appeal and docketing of appeal in this case timely in that:

   a. The Supreme Court of the State of California issued its order denying Appellant's Petition for Rehearing on September 2, 1987;

   b. There were no votes to grant a rehearing;

   c. If for any reason that order should be found to be ineffective, the Petition for Rehearing was deemed denied by operation of California law on September 11, 1987; and

   d. Appellant's Notice of Appeal was not received by the Clerk of the California Supreme Court until

if now docketed, was not docketed until some time after May 16, 1988.

2. If the Notice of Appeal is deemed timely, was the Supreme Court of California justified in disbarring petitioner based on a record established during eighty days of hearing before the State Bar Court, and independent review of that record by the Supreme Court of California, in which Appellant was found culpable of 13 separate counts of misconduct, including (a) engaging in transactions rife with undisclosed conflicts of interest; (b) taking positions adverse to former clients; (c) overstating expenses and double-billing for legal fees; (d) failing to return client files or to provide access to records; (e) failing to give adequate legal advice or to provide his clients with the opportunity to obtain independent counsel when there was an

obvious conflict of interest; (f) filing fraudulent claims and giving false testimony; and (g) engaging in conduct intended to harass his former clients, delay court proceedings, obstruct justice and abuse the legal process.

3. Were Appellant's federal constitutional rights violated by the admission into evidence of the record of various civil proceedings in which Appellant was either a party or a person upon whose behalf the litigation was presented when:

a. The factual issues were the same in both the civil and the State Bar disciplinary proceedings;

b. Petitioner asked for and received at least one stay of the State Bar proceedings on the ground that issues in the State Bar proceeding arose out of the same facts as the civil action;

c. Appellant was afforded full opportunity and had strong motivation to and, in fact, did confront and cross-examine all the witnesses in those civil proceedings;

d. All the civil actions resulted in judgments unfavorable to Appellant and one resulted in a judgment against Appellant and his cohorts for over $26,000,000 in damages, including $1,000,000 in punitive damages assessed against petitioner personally, and findings that petitioner's conduct included breaches of fiduciary duty, fraud and abuse of process?

4. Was Appellant afforded a fair hearing before The State Bar of California and before the California Supreme Court?

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No. 87-1896

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JEROME B. ROSENTHAL,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of California on the ground that it is manifest that the appeal is not taken in conformity with statute or with Supreme Court rules and, even if found to conform to statute and rules, the questions on which the decision of the lower court depends are so

unsubstantial as to not to need further argument.

I

STATEMENT OF THE CASE

This is a direct appeal from the judgment of the Supreme Court of California disbarring Jerome B. Rosenthal ("Appellant"). Rosenthal v. State Bar, 43 Cal.3d 612, 238 Cal.Rptr. 377, 738 P.2d 723 (1987) reh'g. denied Sept., 1987. (Appellant's Supplemental Appendix.) The California Supreme Court adopted the discipline unanimously recommended by the State Bar Court and the Review Department of The State Bar of California ("Review Department"). Id. at 636.

State Bar Proceedings

Investigation of the complaint of Doris Day Melcher and her son, Terrence Paul Melcher ("Melchers") against Appellant began in September 1971. Appellant was formally

noticed of the complaint against him in February 1972. He answered in April 1972. In October 1972, the Hearing Panel of The State Bar of California ("Hearing Panel") issued a 14-count Notice to Show Cause in Appellant's case.[1] Appellant's Appendix 2. The Notice to Show Cause was served on Appellant in January 1973, and Appellant answered the Notice in March 1973. Following a series of continuations requested by Appellant, procedural motions of Appellant, and the granting of his

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[1] In California, the State Bar Court consists of numerous local hearing panels which take evidence, make findings of fact and, if appropriate, recommendations of discipline. There is one Review Department which reviews Hearing Panel decisions and either adopts or (after giving the parties an opportunity to be heard) modifies the Hearing Panel decision. The ultimate decision or recommendation of the State Bar is made by the Review Department. Cal. Bus. & Prof. Code § 6086; Rules of Procedure of The State Bar of California printed in Cal. Civ. & Crim. Court Rules, vol. 23, part 2, pp. 290-323 (West, 1986).

request that the State Bar proceedings be stayed pending the resolution of the underlying civil suit arising out of the same facts as those recited in the Notice to Show Cause,[2] formal hearings before the Hearing Panel finally began on November 6, 1974.

Between November 1974 and March 1976, Appellant raised several preliminary issues which delayed the commencement of the

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2 Samet v. Day, Los Angeles Super. Ct. No. 938 682, an action initiated by appellant, was consolidated with 12 other actions to which appellant was a party. The trial court entered judgment against appellant for legal malpractice, breach of fiduciary duty, fraud and abuse of process and awarded appellant's former clients over $26,000,000 in compensatory damages, including $1,000,000 in punitive damages against appellant personally. The decision against appellant was announced to the Hearing Panel on September 18, 1974. See Rosenthal v. State Bar, supra, n. 4 at 617. Petitioner appealed and the trial court's decision was unanimously affirmed. Day v. Rosenthal, 170 Cal.App.3d 1125, 217 Cal.Rptr. 89 (1985) reh'g denied Sept., 1985. The California Supreme Court declined to review on October 16, 1985.

evidentiary hearings. Rosenthal v. State Bar, supra, 43 Cal.3d at 617.

In March or April 1976, The State Bar of California ("State Bar") elected to present its case through written materials previously the subject of civil, bankruptcy, probate and tax proceedings between Appellant and the Melchers, pursuant to California Business and Professions Code section 6049.2.[3]

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[3] Business and Professions Code section 6049.2 provides,

> In all disciplinary proceedings . . . the testimony of a witness given in a contested civil action or special proceeding to which the person complained against is a party, or in whose behalf the action or proceeding is prosecuted or defended, may be received in evidence, so far as relevant and material to the issues in the disciplinary proceedings, by means of a duly authenticated transcript of such testimony and without proof of the nonavailability of the witness; provided, the board . . . may decline to receive in evidence any such transcript of testimony . . . when it appears that the testimony was given

(continued...)

Between April 1976 and July 1977, hearings were taken up with Appellant's objections to admission of the transcripts and contentions of bias of the trial court. See Rosenthal v. State Bar, supra, 43 Cal.3d at 617-618. In July 1977, the transcripts were admitted for the limited purpose of determining whether Appellant had been afforded full opportunity to cross-examine witnesses in the civil proceedings pursuant to section 6049.2.

In April 1978, the Hearing Panel specially found that Appellant had been provided full opportunity to cross-examine those witnesses and the State Bar was permitted to introduce the testimony of those witnesses, so far as relevant and

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[3](...continued)
under circumstances that did not require or allow an opportunity for full cross-examination.

Cal. Bus. & Prof. Code, § 6049.2.

material to the issues of the State Bar proceedings. See discussion, infra, at Argument, p. 23.

Presentation of the State Bar's evidentiary case, in the face of continuous objections by Appellant at each attempt to introduce evidence and delayed by various continuances requested by Appellant, concluded in June 1979. Rosenthal v. State Bar. supra, 43 Cal.3d at 618-619.

At that point, Appellant was directed to present his defense. He chose to use the hearings between June 1979 and the summer of 1980 to re-open issues fully argued and decided previously.[4] Finally, in 1980, Appellant began his formal defense, which consisted mainly of his own testimony, supplemented with the testimony of his law

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[4] By November 1979, the Hearing Panel was "imploring" Appellant to present evidence in his defense. See Rosenthal v. State Bar, supra, 43 Cal.3d at 619, especially at n. 9.

firm's accountant, lawyers who had represented him in the civil proceedings, his ex-wife, a long-time friend (coincidentally a disbarred attorney), and a data processing service operator. See Rosenthal v. State Bar, supra, 43 Cal.3d at 619-620.

The formal hearings were concluded on August 16, 1984.

Appellant's Conduct

The State Bar proceedings against Appellant arose out of his 18-year relationship with Doris Day Melcher and her husband, Martin Melcher. Beginning in 1956, Appellant served as Mr. and Mrs. Melcher's ("Clients") attorney and in various other capacities, including business and financial advisor. In addition, Appellant represented several corporations in which Clients held an interest. Appellant also represented Terrence Melcher, their 26-year old son,

whom Appellant had arranged to have appointed administrator of Martin Melcher's estate for a brief period in 1968. The relationship between the Melchers and Appellant ended shortly after the death of Martin Melcher, when the Melchers terminated Appellant's representation in May 1968. Thereafter, the Melchers and Appellant were engaged in litigation based upon Appellant's long-term and multifarious abuse of his previous association with Clients.[5]

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[5] Included are the 13 separate suits consolidated in Day v. Rosenthal, 170 Cal.App.3d 1125, 217 Cal.Rptr. 89 (1985); Dallas Cabana, Inc. v. Collier, 469 F.2d 606 (5th Cir. 1972); and Doanbuy Lease & Co. v. Melcher, 448 P.2d 334 (1971). At one point in the history of the Melcher/Rosenthal litigation, 18 lawsuits were pending in five jurisdictions, from Oklahoma to California. Day v. Rosenthal, supra, 170 Cal.App.3d at 1134. Of the 13 consolidated in California, 10 had been initiated by appellant against his former clients. That same pattern of filings in other jurisdictions led the court in Rosenthal v. State Bar to comment, "He skillfully and with malice abused the process of the courts to harass his former

(continued...)

Appellant's misconduct, peripheral to the issues considered by this Court, demonstrated in a record which is the product of 80 days of hearing, and set forth in the California Supreme Court's opinion in Rosenthal v. State Bar, supra, 43 Cal.3d 612, may be briefly summarized: In conjunction with his legal representation of Clients, Appellant made large investments of their money in ventures in which Appellant had a personal interest and which ventures Appellant knew or should have known were in poor financial condition or were unwise investments,[6] but provided no protection for Clients relative to these investments. The court concluded that Appellant (1) engaged

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[5](...continued)
clients." 43 Cal.3d at 631.

[6] Among these ventures were Dallas Cabana Hotel, Inc., Palo Alto Cabana Hotel, Inc. Doanbuy Lease & Company, Inc.

in transactions rife with undisclosed conflicts of interest; (2) overstated expenses and double-billed for legal fees; and (3) failed to give adequate legal advice or to provide Clients with the opportunity to obtain independent counsel; all to the financial detriment of Clients.

After the Melchers discharged Appellant in 1968, Appellant (1) refused to return their files and records, necessitating the court appointment of a receiver and the sheriff's physical presence for the Melchers to ultimately secure the files and records; (2) filed fraudulent claims and gave false testimony in the bankruptcy proceeding of Dallas Cabana Hotel, causing significant loss to the bankruptcy estate; (3) filed numerous lawsuits against the Melchers, with the purpose of harassing them and obstructing justice. The court concluded that Appellant did everything possible to

delay court proceedings, obstruct justice and abuse the legal process.

II

ARGUMENT

A. THIS APPEAL SHOULD BE DISMISSED ON THE GROUND THAT IT IS NOT TIMELY

"An appeal . . . shall be in time when the notice of appeal . . . is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided in Rule 12. See 28 U.S.C. §§ 2101(a), (b), and (c)." Rule 11.2, Rules of the Supreme Court of the United States.

"Any . . . appeal intended to bring any judgment or decree in a . . . proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree . . . ." 28 U.S.C., § 2102(c).

"Not more than 90 days after the entry of the judgment appealed from, it shall be

the duty of the Appellant to docket the case . . . ." Rule 12.1, Rules of the Supreme Court of the United States.

"[T]he time for filing the notice of appeal . . . runs from the date of the denial of rehearing or the entry of a subsequent judgment." Rule 11.3, Rules of the Supreme Court of the United States.

On July 13, 1987, the Supreme Court of California issued an opinion in Appellant's case, ordering his disbarment. Rosenthal v. State Bar, supra, 43 Cal.3d at 636.

On August 6, 1987, the Supreme Court of the California extended the time for granting or denying rehearing in Appellant's case until September 11, 1987, pursuant to

California Rule of Court 24(a).[7]

Appellant's Appendix 7.

On September 2, 1987, Appellant's Petition for Rehearing was denied by the court. Appellant's Appendix 8. The order denying rehearing was signed by Malcolm Lucas, Chief Justice of the Supreme Court of California.[8]

On September 11, 1987, by operation of California law, the California Supreme Court's jurisdiction to rehear Appellant's appeal under the August 6 extension lapsed, and the petition for rehearing was deemed

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[7] Rule 24(a) provides, "A decision of the Supreme Court becomes final 30 days after filing unless the court . . . prior to the expiration of the 30-day period or any extension, orders one or more additional periods not to exceed a total of 60 additional days . . . ." Cal. Rules of Court, rule 24(a).

[8] Chief Justice Lucas had recused himself from this case on April 29, 1987. Appellant's Appendix 6.

denied pursuant to California Rule of Court 27(e).[9]

On February 18, 1988, the Supreme Court of California, per Acting Chief Justice Arguello, issued an order making clear that the petition for rehearing had been finally denied on either September 2, 1987 via the California Supreme Court Order of that date signed by Chief Justice Lucas (there were no votes for rehearing) or, in the event that that order was ineffective because of the previous recusal of Chief Justice Lucas, on September 11, 1988 by operation of California law. Rule 27(e), supra; Appellant's Appendix 3.

Although petitions for rehearing, while pending, generally suspend the finality of a

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[9] Rule 27(e) provides, "If no order is made before the decision becomes final as provided in subdivision (a) of rule 24, the petition shall be deemed denied . . . ." Cal. Rules of Court, rule 27(e).

judgment, in this case the petition for rehearing was no longer pending as of September 2, 1987, and certainly not after September 11, 1987.

"The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which . . . had been plainly and properly settled with finality." FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 73 S.Ct. 245, 249, 97 L.Ed. 254 (1952). "[T]he mere fact that a judgment previously entered is reentered or revised in an immaterial way does not toll the time within which the review must be sought." Id. at 248.

"For the purpose of the finality which is a prerequisite of review in this Court, the test is . . . whether the record shows that the order of the . . . court has in fact fully adjudicated rights and that that

adjudication is not subject to further review by a State Court." Department of Banking, State of Nebraska v. Pink, 317 U.S. 264, 63 S.Ct. 233, 235, 87 L.Ed. 254 (1942) (per curiam).

Appellant's Petition for Rehearing was denied, at the latest, on September 11, 1987. There was no doubt of the decision of the court in that regard, "[N]o votes to rehear the matter were cast." Appellant's Appendix 3. The subsequent order did not disturb or alter Appellant's legal rights, because that order simply restated, without modification, the court's decision not to rehear Appellant's case. Appellant's Appendix 3.

Appellant here was given full notice, first on September 2, 1987, with the Order Denying Hearing and, second, at the expiration of the August 6 extension on September 11, 1987, that his petition for

rehearing had been denied by the California Supreme Court. No question as to whether the California Supreme Court was going to alter its adjudication of Appellant's rights remained after September 11, 1987. If Appellant had any such doubts, he never expressed them to the court.

Further, this case seems particularly fitting for the application of the principle "that litigation must at some definite point be brought to an end." FTC v. Minneapolis-Honeywell Regulator Co., supra, at 429. The apparently infinite panoply of dilatory tactics Appellant has chosen to use in both the numerous civil actions and the 12 years of proceedings before the State Bar have failed to result in any findings favorable to Appellant. Appellant's contentions have been litigated in the court systems of at least three states, with appeals of each ruling against Appellant

resulting in affirmation of the lower courts' judgments. Appellant has appealed the recommendation of disbarment of the State Bar to the court of last resort in California. That court rendered its judgment of disbarment. That court denied rehearing at the latest on September 11, 1987.

United States Supreme Court rules 11.2, 11.3 and 12.1 and 28 United States Code section 2101(c) require that the appeal in this matter be filed 90 days from the denial of rehearing. Ninety days from September 2, 1987 ran on December 1, 1987. Ninety days from September 11, 1987 ran on December 10, 1987. Appellant filed a Notice of Appeal to the Supreme Court of the United States on February 28, 1988. Thus, Appellant's Notice of Appeal of February 28, 1988 and the docketing of his appeal, if now

accomplished (sometime after May 16, 1988), are not timely.

Appellant's appeal should be dismissed for lack of jurisdiction of this Court on the ground that the appeal is not taken in conformity with rules 11 and 12 of the Supreme Court of the United States, or with 28 United States Code section 2101(c).

B. THE CALIFORNIA SUPREME COURT'S ORDER DISBARRING APPELLANT WAS PROPER AND JUSTIFIED BY THE RECORD

In California, the Supreme Court of the State of California has the final authority to determine the appropriate discipline to be imposed upon attorneys charged in State Bar disciplinary proceedings. Waysman v. State Bar, 41 Cal.3d 452, 456, 224 Cal.Rptr. 101, 714 P.2d 1239 (1987); Yokozeki v. State Bar, 11 Cal.3d 426, 450, 113 Cal.Rptr. 602, 521 P.2d 858 (1974).

The California Supreme Court, in independent review, must weigh and pass on

the sufficiency of the evidence. Waysman v. State Bar, supra, 41 Cal.3d at 456; Alberton v. State Bar, 37 Cal.3d 1, 11, 206 Cal.Rptr. 373, 686 P.2d 1177 (1984).

The independent review of Appellant's case by the California Supreme Court revealed, in its words, "[P]etitioner's (Appellant herein) arguments [to be] completely meritless." Rosenthal v. State Bar, supra, 43 Cal.3d at 633. The court cites Appellant's "lack of a meritorious defense." Id. at 636; emphasis in original. The court found disbarment "amply warranted by the egregious nature of [Appellant's] conduct and the need to protect the public from further injury." Id. at 636.

The Samet v. Day trial court found that the Clients were "neither sophisticated investors nor experienced in business affairs and were dependent on [Appellant] for legal and business advice, and

susceptible to his influence."[10] Rosenthal v. State Bar, supra, 43 Cal.3d at 621. California policy as to the duty an attorney owes his clients is high. "An attorney's duty of fidelity to his client involves far more than refraining from exercising undue influence . . . . [A]ll business dealings between attorney and client whereby the attorney benefits are closely scrutinized for any unfairness on the attorney's part . . . especially where there is great intellectual inequality, and

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10 In his jurisdictional statement, appellant depicts his relationship with the Melchers as carrying out the "brilliant and prophetic planning of Martin Melcher consistent with his 'empire plan' . . . ." Appellant's Jurisdictional Statement, p. 16. In asking the court to view appellant's actions as loyally carrying out the directives of his clients, it is notable that appellant relies upon Martin Melcher to corroborate his version of the circumstances of his representation. Mr. Melcher, who died in 1968, is the single Melcher witness unavailable to refute appellant's contentions.

comparative inexperience on the part of the [client]." Magee v. State Bar, 58 Cal.2d 423, 430-431, 24 Cal.Rptr. 839, 374 P.2d 807 (1962). Here just such relationship existed between Appellant and Clients. The record demonstrates the abuse which Appellant practiced upon Clients and to his own benefit.

In light of the record in the State Bar proceedings and in the underlying civil litigation, the California Supreme Court acted properly and was entirely justified in ordering Appellant's disbarment.

C. APPELLANT'S CONSTITUTIONAL RIGHTS WERE SCRUPULOUSLY PROTECTED, BOTHIN THE STATE BAR PROCEEDINGS AND BEFORE THE CALIFORNIA SUPREME COURT

"A State cannot exclude a person from the practice of law . . . in a manner or for reasons which contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 756,

1 L.Ed.2d 796 (1957). "[P]rocedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." Wilner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 1180 (1963); Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 1419-1420 (1959).

However, "this does not mean that in every case confrontation and cross-examination are automatically required . . . . The circumstances will determine the necessary limits and incidents implicit in the concept . . . ." Wilner, supra, 83 S.Ct. at 1182.

Here Appellant, an experienced attorney, had the opportunity and strong motivation to cross-examine the witnesses whose testimony was used as evidence in the State Bar proceedings. The transcripts themselves indicate that Appellant took full

advantage of that right in each of the proceedings. We submit that admission of this evidence violated no constitutional right of Appellant, and he has pointed to no authority to the contrary.

Appellant was afforded procedural due process in the State Bar disciplinary proceedings and before the California Supreme Court. "In reviewing state action . . . we look to substance, not to bare form, to determine whether constitutional minimums have been honored." Wilner v. Committee on Character and Fitness, supra, 83 S.Ct. at 1182.

In March 1976, the State Bar Examiner announced that he would present the State Bar's case based upon written materials previously the topic of civil, probate, bankruptcy and tax proceedings between Appellant and the Melchers, pursuant to section 6049.2 of the California Business

and Professions Code. Nearly one and a half years were spent litigating Appellant's objections to the admission of this evidence. In July 1977, the Hearing Panel ruled that the transcripts could be admitted for the limited purpose of determining whether testimony in the civil proceedings had met the test of being given under circumstances which required or allowed an opportunity for Appellant's full cross-examination. The Hearing Panel's examination of the voluminous transcripts occupied nearly another full year, until April 1978. The unanimous Hearing Panel specially found that the testimony in the civil actions had been given under circumstances that required or allowed Appellant opportunity for full cross-examination. Not only were the transcripts painstakingly scrutinized to assure that Appellant's rights to confrontation and

cross-examination had been protected, Appellant's objections were reconsidered at each introduction of that testimony by the State Bar. Rosenthal v. State Bar. supra, 43 Cal.3d at 617-618.

Appellant was either a party to, or a person on whose behalf the civil proceedings were prosecuted or defended. They were all cases involving Appellant or Appellant's law firms or corporations which Appellant controlled. The California Supreme Court disbarring Appellant observed:

> In each proceeding, petitioner [Appellant] enjoyed a full opportunity, and had a strong motivation effectively to cross-examine adverse witnesses . . . . [H]e had, at that time, ample interest and motive in refuting any false accusations of statements . . . . [H]e cannot seriously claim a lesser motive in proving his assertions in those proceedings on behalf of himself, his corporations, and his clients, than he has in proving the same

> assertions now on behalf of his license to practice law . . . .

Rosenthal v. State Bar, supra, 43 Cal.3d at 633.

Testimony of witnesses contained in transcripts of contested civil actions are admissible as evidence in State Bar disciplinary proceedings, when the charged attorney had an opportunity to cross-examine those witnesses in the underlying civil actions pursuant to Business and Professions Code section 6049.2. Moreover, contrary to Appellant's assertions, California Business and Professions Code section 6049.1 does not exclude transcripts of underlying non-disciplinary proceedings. Yokozeki v. State Bar, supra, 11 Cal.3d at 444; Caldwell v. State Bar, 13 Cal.3d 488, 497, 119 Cal.Rptr. 217, 531 P.2d 785 (1975); Rosenthal v. State Bar, supra, 43 Cal.3d, n. 11 at 622. When the issues in the civil actions and the disciplinary proceedings are

factually identical, California law provides that not only the transcripts but the entire record, including findings and decisions in those civil matters, may be considered in the disciplinary proceeding. Lee v. State Bar, 2 Cal.2d 927, 940-941, 88 Cal.Rptr. 361, 472 P.2d 449 (1970); Eschwig v. State Bar, 1 Cal.3d 8, 18, 81 Cal.Rptr. 352, 459 P.2d 904 (1969); Yokozeki v. State Bar, supra, 11 Cal.3d at 444; Caldwell v. State Bar, supra, 13 Cal.3d at 497. Appellant has presented no authority showing that this practice violates any federal constitutional right.

D. APPELLANT WAS PROVIDED A FAIR HEARING BEFORE THE STATE BAR OF CALIFORNIA AND BEFORE THE CALIFORNIA SUPREME COURT

"A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). In Wilner, supra, an attorney was denied admission to the bar

of the State of New York because he failed to satisfy the character and general fitness requirements of that state. This Court found that Wilner had been denied procedural due process when he was denied admission without a hearing on accusations asserted against him. Wilner v. Committee on Character and Fitness, supra, 93 S.Ct. at 1181.

Justice Goldberg, joined in his concurring opinion in Wilner by Justices Brennan and Stewart, stated:

> The constitutional requirements . . . may be simply stated: in all cases in which admission to the bar is to be denied . . . the applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence . . . ."

Id. at 1182.

Setting out further detail, Wilner continues:

> The circumstances will determine the necessary limits and incidents implicit in the concept of a "fair" hearing. Thus, for example, when the derogatory matter . . . is of an undisputed documentary character disclosed to [Appellant], and it is plain and uncontradicted that the committee's recommendation is predicated thereon and reasonably supported thereby, then neither the committee's informal procedures, its ultimate recommendations, nor a court ruling sustaining the committee's conclusion may be properly challenged on due process grounds, provided the [Appellant] has been informed of the factual basis of the conclusion and has been afforded an adequate opportunity to reply or explain.

Id. at 1182.

Appellant's case differs from Wilner in that it is an action for disbarment and Appellant had protracted hearings before the Hearing Panel, an appearance before the Review Department, and written briefings and oral argument before the California Supreme Court in which to reply and explain.

However, the principles stated in Wilner apply.

Appellant was before the Hearing Panel for 80 days of hearing. Every one of his considerable number of objections, motions and requests for continuances and stays was fully deliberated. As the evidence presented against him was written material from various civil proceedings at which he had been present, he certainly was informed of the factual basis of the State Bar's case. Appellant was given adequate opportunity to review and explain that material during the disciplinary proceedings.

Appellant was given special treatment by the Review Department. He requested and was granted permission to tape record oral argument.[11] He requested and was given

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11 Appellant even abused this unusual privilege, by "accidentally" leaving his (continued...)

twice the customarily allotted time to present his oral argument.

E. APPELLANT'S CONTENTIONS

1. California Business and Professions Code Section 6083(c)

Section 6083, subsection (c) of the California Business and Professions Code provides that the burden of showing that the Review Department's recommendation is erroneous or unlawful is upon the attorney before the California Supreme Court for review. Appellant claims this is unconstitutional. However, Supreme Court review only follows proceedings before the State Bar Court in which the burden of showing culpability rests with the State Bar to prove by evidence sustaining clear and convincing proof to a reasonable certainty.

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[11](...continued)
recorder running during the closed executive session that the Review Department held to decide the question of appellant's taping of oral argument.

Vaughn v. State Bar, 6 Cal.3d 847, 852, 100 Cal.Rptr. 713, 494 P.2d 1257 (1972); Midoff v. State Bar, 71 Cal.2d 535, 550, 78 Cal.Rptr. 696, 455 P.2d 800 (1969). Moreover, the purpose of proceedings for attorney discipline is not to punish, but rather to protect clients, the public and the profession of law, and to determine the fitness of an attorney to practice law in California. Bradpiece v. State Bar, 10 Cal.3d 742, 748, 111 Cal.Rptr. 905, 518 P.2d 337 (1974). Because the essence of the proceedings is not punitive, the rules of criminal procedure do not apply.[12] Eschwig v. State Bar, supra, 1 Cal.3d at 18.

It is a part of California policy regulating the practice of law to give

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12 Likewise, appellant's contention that a "beyond a reasonable doubt" standard of proof is appropriate in bar disciplinary proceedings is incorrect.

great weight to determinations of the State Bar in the Supreme Court's independent review. In keeping with that policy, the burden of demonstrating to the Supreme Court the error or illegality of the Review Department's recommendations rests upon Appellant.

Appellant's only due process entitlement is a "fair hearing." Smith v. State Bar, 38 Cal.3d 525, 532, 213 Cal.Rptr. 326, 698 P.2d 139 (1985); Rosenthal v. State Bar, supra, 43 Cal.3d at 634. Appellant was provided with a fair hearing.

Appellant failed to demonstrate to the California Supreme Court, in its independent review of the record, that the unanimous decisions of the Hearing Panel and Review Department were erroneous or unlawful. Rather, the court found "[p]etitioner's arguments completely meritless" and his defense "devoid of any sincere discussion of

the merits and serious findings against him." Further, the California Supreme Court pointed out Appellant's brief was devoid of citations to support claims or attacks upon the truth of the State Bar Court's findings and conclusions beyond Appellant's assertions that he was guilty of "no wrongdoing whatsoever." Rosenthal v. State Bar, supra, 43 Cal.3d at 632-634. His arguments to this Court are essentially in that same vein.

2. The Question of Delay

Appellant has contended before this Court and at each stage in the proceedings that he has been prejudiced by delay. In this case, most of the delay was the result of Appellant's request for stay because of the pendency of Samet v. Day, supra, or Appellant's own dilatory tactics.

3. The Question of Bias or Improper Conduct

Appellant's Jurisdictional Statement charges misconduct by the various bodies which have heard his case. He accuses the California Supreme Court of deliberate misconstruction of the record, and imputes to the State Bar Examiner misrepresentation and concealment of the truth. Appellant's Jurisdictional Statement, pp. xii, xv. This contention is typical of the manner in which Appellant has responded to the charges against him. Rather than present any positive evidence in his defense, he has maintained a barrage of procedural and accusatory offensive tactics. See Rosenthal v. State Bar, supra, 43 Cal.3d at 632-634. Courts in other states found the same modus in Appellant's behavior. See Rosenthal v. State Bar, supra, 43 Cal.3d at 625, 626, 630.

III

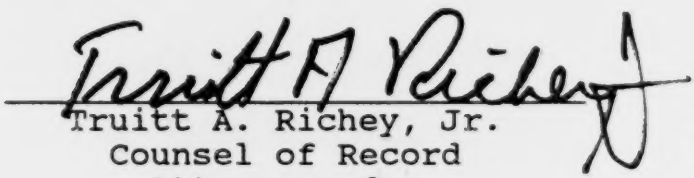
CONCLUSION

The decision and order of the Supreme Court of the State of California was reached in accord with the constitutional principles established by this Court.

The appeal filed herein should be dismissed for failure of timeliness. The opinion of the California Supreme Court should be affirmed.

Respectfully submitted,

Diane C. Yu
Truitt A. Richey, Jr.
Richard J. Zanassi



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Counsel of Record
Attorneys for
The State Bar of California

DECLARATION OF SERVICE BY MAIL

I, Chiyeko Kimura, declare as follows:

I am a citizen of the United States and a resident of the County of San Francisco. I am over the age of eighteen years and not a party to the within entitled action. My business address is 555 Franklin Street, San Francisco, California 94102. On June 30, 1988, I served the within

MOTION TO DISMISS OR AFFIRM

on the interested parties by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

JEROME B. ROSENTHAL
Suite 800
6535 Wilshire Boulevard
Los Angeles, California 90058

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 30th day of June, 1988 at San Francisco, California.

Chiyeko Kimura